No. 82-1833

IN THE

Supreme Court of the United States

October Term, 1982

ANGEL SANTIAGO,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

RESPONDENT'S BRIEF IN OPPOSITION

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June 23, 1983

Questions Presented

1. Whether, when a spectator exclaimed in the presence of the jury over the death of the murder victim, the Constitution requires the trial court to grant a motion for mistrial rather than giving curative instructions which were effective and to which there were no objections.

2. Whether the evidence was insufficient to warrant submission of the case to the jury.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, the State of New York, asks this Court to deny the petition for a writ of certiorari, seeking review of the judgment of the Appellate Division of the New York State Supreme Court, Second Department, in this case. That judgment was not accompanied by an opinion. It is reported at 92 A.D.2d 618, 459 N.Y.S.2d 953 (1983).

Opinions Below

The judgment of conviction was affirmed, without opinion, in the court below. 92 A.D.2d 618, 459 N.Y.S.2d 953 (1983). Leave to appeal was denied by an Associate

Judge of the New York Court of Appeals on March 24, 1983. 58 N.Y.2d 1123 (1983).

Jurisdiction

The judgment of the Appellate Division of the New York State Supreme Court, Second Department was entered on February 23, 1983, affirming defendant's judgment of conviction, dated February 9, 1982. A certificate denying leave to the Court of Appeals was issued March 24, 1983. The petition for certiorari was filed within 60 days of that date. Jurisdiction is invoked under 28 U.S.C. § 1257.[1]

Constitutional and Statutory Provisions Involved

United States Constitution, Fifth Amendment:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

United States Constitution, Fourteenth Amendment:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law. . . .

New York Penal Law § 125.20:

> A person is guilty of manslaughter in the first degree when:
>
> 1. With intent to cause serious physical injury to another person, he causes the death of such person or another person . . . .

New York Penal Law § 265.03:

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[1] Petitioner also incorrectly invokes jurisdiction under 28 U.S.C. § 1254, which applies to review of a decision of a federal court of appeals.

> A person is guilty of criminal possession of a weapon in the second degree when he possesses . . . a loaded firearm with intent to use the same unlawfully against another.

Statement of the Case

Introduction

Angel Santiago was convicted, after a jury trial, of Manslaughter in the First Degree and Criminal Possession of a Weapon in the Second Degree [New York Penal Law § 125.20 and § 265.03]. He was sentenced on February 9, 1982, to concurrent terms of imprisonment of from three to nine years for Manslaughter in the First Degree and from one and one-half to four and one-half years for Criminal Possession of a Weapon in the Second Degree. The conviction was affirmed without opinion by the Appellate Division, Second Department, 92 A.D. 2d 618, 459 N.Y.S. 2d 953 (1983). Leave to appeal to the Court of Appeals was denied. 58 N.Y. 2d 1123 (1983).

Defendant is presently at liberty pursuant to a stay of execution granted by the trial court, which has now expired. He is scheduled to surrender on June 23, 1983.

The Evidence at Trial

Angel Santiago was convicted for shooting Alex Aponte to death on June 19, 1979 during a fight in the hallway of the apartment house where they both lived. Defendant had accused Aponte of stealing televisions and stereos from his apartment. Aponte denied that he had been the burglar. Defendant and his brother[2] began beating Aponte

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[2] The brother, Richard Santiago, was tried jointly with defendant and convicted of Criminal possession of a Weapon in the Fourth Degree. He was sentenced to a conditional discharge and did not appeal his conviction.

in full view of three witnesses: Hermino Alvarez, Nadine Guevarro and Hilda Aponte [3] (Alvarez 141-147; Guevarro: 244-245, 248, 270; Aponte: 288-289).[4] Hilda Aponte saw a gun in defendant's hand (Aponte: 295). She and Alvarez saw gunshot flashes emanating from defendant's hand as it was extended towards Aponte (Alvarez: 144-145, 153; Aponte: 294-296). At the moment of the first gunshot Guevarro was looking directly at Richard Santiago. She turned and saw defendant standing on the side of the elevator from where the sparks and noise emanated (Guevarro: 256). Before defendant left the scene defendant warned Alvarez that he would "get the same thing he [the victim] got" if Alvarez did not stop aiding the fatally wounded Aponte (Alvarez: 148, 226; Guevarro: 259).

The Spectator's Outburst

During summation by Richard Santiago's attorney an unidentified spectator yelled: "I'm the mother, your Honor. I'm the mother. They killed my son. Both of them killed my son. I'm the mother. They killed my son" (569). The spectator was immediately ushered out of the courtroom. The court denied the defendant's motion for a mistrial and immediately gave the jury the following curative instructions:

> Ladies and gentlemen of the jury: You know in the beginning of this trial, we were only interested and our total aim was in making sure that the defendants received a fair trial by a fair and impartial jury.
>
> Now you heard that outburst, in Court by the mother of the decedent, and I'm telling you now that as jurors you must disregard that and not

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[3] The sister of the victim.

[4] Numbers in parentheses refer to pages of the trial record.

> take into consideration when you go into your deliberations anything that she said. I'm going to ask you all to be able to look into the recesses of your mind, and ask you, do you feel that you can put aside and disregard totally what that woman said when she had her outburst in Court?
>
> THE JURY: Yes.
>
> THE COURT: You all assure me that you can do it, because [what] she said is totally not acceptable evidence, and you cannot under any circumstances consider it in the determination of the guilt or lack of guilt of these defendants.
>
> You all will show me that?
>
> Indicate that each juror has said so (573-574).

Defendant did not object to the sufficiency of the curative instructions or to the manner used by the court to poll the jury.

During the charge, the court re-emphasized the jury's responsibility to render a fair and impartial decision, uninfluenced by the spectator's outburst:

> As jurors, your fundamental duties [sic] to determine from all the evidence that you have heard and the exhibits that have been submitted, what the facts are.
>
> You, the jurors are the sole and exclusive judges of the facts. In that field you are supreme, and neither I nor anyone else can invade your province.
>
> As the sole and exclusive judges of the facts, you will decide and determine what occurred or what did not occur on June 19, 1979 in the second floor hallway of premises 899 Montgomery Street in Brooklyn, and you will do it coolly, calmly, deliberately and without fear, or favor or passion or prejudice or sympathy or vengeance of any kind (694-695).

> The law requires that your decision be made solely upon the competent evidence before you. Such items as I have excluded from your consideration were excluded because they weren't legally admissible.
>
> I particularly draw your attention to your assurance to me that you will be able to dismiss from your minds the outburst of the decedent's mother in court yesterday. Her outburst was as a result of the emotion from her loss. Your decision cannot be based on emotion. Your decision must be based on admissible evidence. You have an obligation to your oath of office to do what you are directed to do by this charge (698).

Once again, defendant did not object to the sufficiency of the instructions (742-743).

Reasons Why The Writ Should Be Denied

1. The Court Below Correctly Determined That Curative Instructions Were Sufficient to Protect Defendant From Any Potential Prejudice Caused by the Spectator's Outburst, And Did Not Decide Any Question of Law Worthy of This Court's Review.

Defendant has not presented any issue of constitutional dimension for review by this Court. A well-established and crucial assumption underlying the system of trial by jury is that juries will follow the instructions given to them by the trial judge. *Parker v. Randolph*, 442 U.S. 62, 73 (1979); *Opper v. United States*, 348 U.S. 84, 95 (1954).

The exemplary action of the trial judge in giving clear and repeated instructions fully protected defendant's right to a fair trial before an impartial jury. In a proper exercise of his discretion the trial judge effectively and

decisively minimized the impact of the sudden outburst by the mother of the deceased.

The trial judge promptly, repeatedly, and clearly instructed the jury to disregard the incident totally. Defendant did not object to the sufficiency of these instructions or to those given subsequently during the regular charge. The jurors assured the court that they would not, under any circumstances, consider the outburst in determining the guilt of the defendants. Under those circumstances, it cannot be said that the trial court abused its discretion or violated any constitutional right of the defendant. *Christian v. United States*, 394 A.2d 1, 23 (D.C.C.A. 1978), *cert. denied*, 442 U.S. 944 (1979); *State v. Sorrels*, 33 N.C. App. 374, 235 S.E.2d 70 (1977). In affirming that decision the court below did not decide any question of law worthy of review by this Court.

Similarly, there is no merit to defendant's claim that general inquiry by the trial judge of the jurors *en masse* was constitutionally infirm. Defendant's reliance on *United States v. Lord*, 565 F.2d 831 (2d Cir. 1977), is misplaced. That was not a constitutional decision but rather an exercise of federal supervisory powers and has no relevance to this New York State conviction. Moreover, even under the rule of *Lord* there was no error here. In that case the Second Circuit held that when jurors have been exposed to newspaper publicity, it may be necessary to make individual inquiry into the extent of the publicity to which each individual juror was exposed.[5] Under those conditions the court has to examine each juror individually to determine the extent of the exposure

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[5] In *Lord* and in *Marshall v. United States*, 360 U.S. 310 (1959), also relied upon by defendant, judgments of conviction were reversed because of the prejudice which resulted from the repeated exposure of jurors, outside of the courtroom, to newspaper reports of the trials or the crimes charged.

and what steps, if any, are required to insure that the trial proceeds fairly. Here, by contrast, the court witnessed the potentially prejudicial incident, and immediately and promptly did all that was required to protect defendant's rights. Indeed, defense counsel, who did not object, did not perceive any unfairness in the method of questioning.

Defendant has not raised any constitutional issue which warrants consideration by this Court.

2. The Defendant's Challenge to the Sufficiency of the Evidence Has No Merit, And In Any Event, Does Not Raise a Substantial Constitutional Question.

The evidence adduced at trial was plainly sufficient to support the trial court's decision to submit this case to the jury. There can be no constitutional error in that decision if "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). This standard gives full play to the responsibility of the jury to resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from the facts.

The record clearly establishes the evidence was sufficient to submit the case to the jury. An eyewitness testified that defendant had a gun in his hand and that the flashes from the gunshots which killed Alex Aponte emanated from the precise area into which defendant had extended his hand. The trial court properly refused to substitute for the jury its own determinations concerning the credibility of the witnesses and the weight to be accorded the evidence. *United States v. Artuso*, 618 F.2d 192, 195 (2d Cir.), *cert. denied*, 449 U.S. 879 (1980).

Furthermore, this Court should decline to review defendant's claim because there is an adequate and independent state ground to support the decision of the court below. *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977); *Henry v. Mississippi*, 379 U.S. 443 (1965). The prevailing rule in New York, when there is doubt about the sufficiency of the evidence, is that a trial judge should submit the case to the jury. If the verdict is then set aside upon defendant's motion, the ruling can be appealed and, if appropriate, the verdict reinstated. This procedure avoids the problems of double jeopardy created when a motion is prematurely decided before submission of the case to the jury for its determination. *People v. Key*, 45 N.Y.2d 111, 120, 408 N.Y.S.2d 16, 22, 379 N.E. 2d 1147, 1152 (1978). Thus, the trial court followed settled state practice in submitting the case to the jury.

This case, which was decided upon well-settled rules of law, presents no issue for review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

DATED: Brooklyn, New York
June 23, 1983

Respectfully submitted,

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